



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Family Law Proceedings and Intra UK Jurisdiction

Citation for published version:

Maher, G 2008, 'Family Law Proceedings and Intra UK Jurisdiction', *Juridical Review*, pp. 315-17.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Juridical Review

Publisher Rights Statement:

©Maher, G. (2008). Family Law Proceedings and Intra UK Jurisdiction. *Juridical Review*, 315-17.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Family law proceedings and intra UK jurisdiction

The rules of jurisdiction in various types of family law proceedings are contained in the so-called Brussels II bis Regulation (Council Regulation (EC) No 2201/2003) which came into force on 1 March 2005, replacing an earlier and less extensive instrument which itself came into force on 1 March 2001. As a form of legislation under EU law the Regulation clearly applies in situations where jurisdiction in family actions is to be allocated between two or more EU states (but not including Denmark). But there is a view that the Regulation has a wider scope and that it also applies to conflicts of jurisdiction between the courts in the different legal systems within the United Kingdom. It is perhaps surprising that anyone should ever have thought that this is the case, as it is generally accepted that EU regulations and conventions on jurisdiction (eg the Brussels Convention 1968, the Brussels I Regulation (Council Regulation (EC) No 44/2001), the EU Insolvency Regulation (Council Regulation (EC) No 1346/2000)) do not by themselves alter the law of jurisdiction in a member state in cases which are purely internal to that state. In other words, one would expect that there would be something in the Brussels II bis Regulation itself which makes it abundantly clear that it applies to cases within one member state which involve no contact with any other state.

Nevertheless, there is a Scottish decision which is premised on the basis that the Regulation allocates jurisdiction between the UK legal systems in cases of this type. This is *S v D* 2007 SLT (Sh Ct) 37. Unfortunately, the decision in that case gives no reason for adopting the position on the scope of the Regulation, which is rather treated as self-evidently true. Yet there are formidable difficulties in finding any basis for this approach. I have described these in some detail in a previous paper (see 2007 SLT (News) 117) and there is no need to repeat those arguments here. However, there is one supposed basis for accepting an extensive scope for the Regulation which is worth noting, for at first glance it looks like a solid, almost decisive, consideration but which on reflection has next to no bearing on the issue.

This point focuses on article 66 of the Regulation, which is headed 'Member States with two or more legal systems'. Article 66 provides rules in respect of such legal systems "concerning matters governed by this Regulation" to the effect that where

the Regulation refers, for example, to connecting factors such as habitual residence or domicile in a Member State then for states with more than one legal system the reference is to be taken as meaning the connecting factor in question in the particular territorial unit of the State. And so, the argument runs, as the Regulation contains provisions about allocating jurisdiction between courts in different legal systems within a State, it follows that the Regulation must apply whenever there is an issue of competing jurisdiction within that State.

But simply as a matter of logic this conclusion does not follow. In its own terms Article 66 comes into play when a case is governed by the Regulation but it does not in itself say what those cases are. Rather, this provision uses a different method for achieving what other EU regulations also do, namely allocating jurisdiction not to the courts in a Member State but to the courts for a particular place within a Member State (including states which, like the UK, have more than one legal system). Article 66 is modelled on similar provisions in various Hague Conventions (such as the 1996 Convention on Parental Responsibility and Measures for the Protection of Children), but it has never been suggested that these conventions apply to intra UK conflicts of jurisdiction, far less that they do so because of provisions like article 66 of Brussels II bis.

Moreover, since *S v D* there have been a number of cases which support the view that the decision in that case is wrong and that the Regulation does not apply in purely intra-UK cases. Two of these cases are from Northern Ireland. The first, *Re C and C* [2005] NI Fam 3 is not the strongest of authorities as the issue of the scope of the Regulation was a matter of concession by counsel.

A more direct case is that of *Re ESJ A Minor* [2008] NI Fam 6, for here the judge (Morgan J) was presented with opposing submissions on whether the Regulation applied where the courts in either Wales or Northern Ireland (or both) had jurisdiction over an issue of parental responsibility. His Lordship held that the Regulation had no application in a conflict of jurisdiction which was purely between the courts of different systems within the UK. His method was to look for some indicator which pointed to the application of the Regulation in such disputes but he could find none. He considered article 61(c) of the Treaty (from which the validity of the Regulation is derived), recital 13 to the Regulation, as well as articles 1, 2, 3, 8, 9, 10, and 15 of the Regulation. His conclusion (para 11) was that: "All of these provisions and in particular the transfer provisions [in article 15] strongly suggest that the Regulation is

concerned with jurisdictional disputes between Member States rather than the determination of the particular court within a member State having responsibility for the matter at issue."

Morgan J also paid particular attention to article 66 of the Regulation but reached the commonsense conclusion that for that provision to be engaged it was first necessary to identify the scope of the Regulation itself.

His Lordship also made some comment about the amendments to the Family Law Act 1986 which were made following the coming into force of the Regulation. The provisions of the 1986 Act for England and Wales and for Northern Ireland are broadly similar. (The amendments for Scots law are different.) This point is significant for it has been argued from the perspective of English law that the amended version of the 1986 Act only makes sense on the basis that Regulation applies to intra UK matters. (See K Beevers and D McClean, [2005] International Family Law 129.) Although this is not something on which a Scots lawyer can safely comment, it is worth noting that Morgan J was able to construe the provisions of the 1986 Act for Northern Ireland without arriving at that conclusion.

Finally, there is a more recent sheriff court decision which reaches the opposite conclusion from that in *S v D*. In *MB v CB* (Dunfermline Sheriff Court, 18 August 2008), there was a potential conflict of jurisdiction between courts in Scotland and England in a matter of parental responsibility. After hearing submissions on the point, the sheriff repelled the defender's plea in law that the case was governed by the Brussels II bis Regulation and therefore the sheriff court at Dunfermline lacked jurisdiction. The sheriff adopted an approach similar to that of Morgan J in *Re ESJ A Minor* (though that decision does not appear to have been cited to him). He held that article 66 of the Regulation could not be read as having the effect of making the Regulation applicable to intra UK matters. Provision dealing with the scope of the Regulation had to be found elsewhere. However, for the sheriff there was nothing in the Regulation itself or in the amendments made to Scots law in consequence of the Regulation which provided support for the defender's plea.

It is to be hoped that these decisions will remove any confusion following on from the decision in *S v D*. Until such time as the House of Lords make a reference for a preliminary ruling on the point and the European Court of Justice says otherwise, it

should be taken as settled that the Brussels II bis Regulation does not apply to disputes of jurisdiction which involve only the courts in different parts of the UK.

Professor Gerry Maher QC
University of Edinburgh